UNITED STATES DISTRICT COURT
WESTERN DISTRICT OF WASHINGTON
AT TACOMA

REBECCA HEWLING,

Plaintiff,

v.

CAROLYN W. COLVIN,
Acting Commissioner of Social Security,

Defendant.

CASE NO. 3:15-cv-05316-RJB

ORDER REVERSING AND REMANDING DENIAL OF BENEFITS

Plaintiff, Rebecca R. Hewling, appeals the denial of Supplemental Security Income benefits under the Social Security Act. 42 U.S.C. §§405(g); 1383(c). Plaintiff argues that the Administrative Law Judge (ALJ) erred by failing to give sufficient reasons to reject the opinions of (1) a treating source, Dr. Kelley Aurand; (2) an examining psychologist, Dr. Donna Johns; and (3) third party witnesses. Dkt. 11. The Court has considered Plaintiff's motion, the Response filed by Defendant (Dkt. 12), the administrative record, and the remainder of the file herein.

BACKGROUND

Plaintiff alleges a disability onset day of March 1, 2003. Tr. 165. Plaintiff filed her application for SSI benefits on December 22, 2011, a request that was denied upon reconsideration and again following an administrative hearing on July 12, 2013 and issuance of

an administrative decision. Tr. 18-34, 101, 113. The Appeals Council denied Plaintiff's request for review of the administrative decision. Tr. 1.

Following the five-step process prescribed by 20 C.F.R. §§ 404.1520, 416.920, the ALJ found as follows:

Step One: Plaintiff has not engaged in substantial gainful activity since the alleged disability onsent date. Tr. 20.

Step Two: Plaintiff has the following severe impairments: somatoform disorder, anxiety disorder, attention deficit disorder/attention-deficit hyperactivity disorder, connective tissue disase and neuropathic pain. Tr. 20.

Step Three: Plaintiff's impairments or a combination of her impairments do not meet the per se criteria of 20 §§ 416.920(d), 416.925, 416.926.

Considering Plaintiff's residual functional capacity ("RFC"), the ALJ found that:

> "[Plaintiff has] the residual functional capacity to perform light work as defined by 20 C.F.R. § 416.967(b) [sic] except she can occasionally climb ramps and stairs. She can occasionally climb ladders, ropes, scaffolds, balance, stoop, kneel, crouch, and crawl. She should avoid concentrated exposure to flames, odors, dusts, gases, and poor ventilation. She has sufficient concentration, persistence, and pace to understand, remember and carry out simple instructions for simple routine tasks working at a normal but not fast paced [sic] production rate. She should have rare (10% of time) superficial contact with general public, and should have only occasional, superficial contact with coworkers in a small group setting (10 co-wokers)." Tr. 22, 23.

At Step Four, the ALJ determined that Plaintiff could not perform any past relevant work. Tr. 32.

At Step Five, relying on the testimony of a Vocational Expert (VE), the ALJ determined that jobs exist in sufficient numbers in the national economy that Plaintiff is capable of performing, including occupations such as a "silver wrapper," "office helper," and "mail room clerk." Tr. 33. The opinion of the VE was premised on a hypothetical in which a person is

limited to light work. Tr. 61. *See* 20 C.F.R. § 416.967. The ALJ also added additional limitations to the hypothetical, such as limited exposure to fumes and minimal contact with the coworkers and the general public Tr. 61. When the ALJ modified the hypothetical to describe a person performing at the sedentary exertional level, rather than light work, the VE concluded that there are no jobs available. Tr. 62, 63.

The ALJ gave the opinion of Dr. Kelley Aurand, Plaintiff's treating physician, limited weight because Dr. Aurand's opinion is "not consistent with the record." Tr. 29. Considering Dr. Aurand's August 2010 report, the ALJ stated the basis for discounting her opinion:

> "[f]or example, Dr. Johns noted the claimant retains sufficient concentration to solve puzzles and watch television programs [while] Dr. Aurand found she can walk at least 200 feet without needing to rest. Furthermore, Dr. Aurand failed to explain why she felt the claimant could perform only sedentary work. She seems to have relied on subjective complaints . . . rather than objective findings." Tr. 29.

The ALJ similarly gave Dr. Aurand's March 2012 report limited weight because:

> "it conflicts with the evidence of the record. For example, musculoskeletal range of motion was normal in January 2013. Neck of motion was also normal Mood and affect were normal. (Exhibit 15F/3). Dr. Johns noted intact remote, recent, and immediate memory. In addition, Dr. Aurand's opinion is not persuasive because she did not explain the basis for her limitations." Tr. 29, 30.

The ALJ gave "some weight" to the opinions of examining physician, Dr. Johns, caretaker Andrea Ponce, and Plaintiff's mother, Joyce Hewling. Tr. 29-32. The ALJ gave "limited weight" to the opinion of caretaker Mary Suarez, but gave "significant weight" to the opinion of Dr. Utley. Tr. 28, 29, 31.

STANDARD OF RELIEF

Pursuant to 42 U.S.C. § 405(g), the Court may set aside the denial of Social Security benefits when an ALJ's findings are based on legal error or not supported by substantial evidence in the record as a whole. *Bayliss v. Barnhart*, 427 F.3d 1211, 1214 n.1 (9th Cir. 2005).

"Substantial evidence" is more than a scintilla, less than a preponderance, and is such relevant evidence as a reasonable mind might accept as adequate to support a conclusion. *Richardson v. Perales*, 402 U.S. 389, 401 (1971); *Magallanes v. Bowen*, 881 F.2d 747, 750 (9th Cir. 1989). The ALJ is responsible for determining credibility, resolving conflicts in medical testimony, and resolving any other ambiguities that might exist. *Andrews v. Shalala*, 53 F.3d 1035, 1039 (9th Cir. 1995).

At the administrative hearing, the Plaintiff bears the burden of proving she is disabled. *Meanel v. Apfel*, 172 F.3d 1111, 1113 (9th Cir. 1999). "Disability" is defined as the "inability to engage in any substantial gainful activity" due to a physical or mental impairment which has lasted, or is expected to last, for a continuous period of not less than twelve months. 42 U.S.C. §§ 423(d)(1)(A), 1382c(3)(A). A claimant is disabled only if her impairments are of such severity that she is unable to do her previous work, and cannot, considering her age, education, and work experience, engage in any other substantial gainful activity existing in the national economy. 42 U.S.C. §§ 423(d)(2)(A). *See also Tackett v. Apfel*, 180 F.3d 1094, 1098–99 (9th Cir. 1999). While the Court is required to examine the record as a whole, it may neither reweigh the evidence nor substitute its judgment for that of the ALJ. *See Thomas v. Barnhart*, 278 F.3d 947, 954 (9th Cir. 2002). However, "[w]here the evidence is susceptible to more than one rational interpretation, one of which supports the ALJ's decision, the ALJ's conclusion must be upheld." *Id.*

DISCUSSION

Each issue raised by Plaintiff is addressed in turn.

a. Treating source: Dr. Kelley Aurand (Tr. 29, 30, 492-500)

According to Plaintiff, the ALJ failed to give sufficient reasons to reject the opinion of treating physician, Dr. Kelley Aurand. Dkt. 11, at 3-7. *See, e.g.*, Tr. 492-500. Plaintiff's argues

that Dr. Aurand's report, in which she concludes that Plaintiff can only perform sedentary work, is uncontradicted and supported by the record. Dkt. 11, at 3-7. In response, Defendant argues that the ALJ properly gave little weight to Dr. Aurand's report, because: the report is premised on Plaintiff's self-reported symptoms, and Plaintiff is less than credible; and the ALJ gave specific and legitimate reasons for rejecting the report, including reliance on two reports, from Dr. Donald Ramsthel (Tr. 325-29) and Dr. Rodney Utley (Tr. 90-92), which were supported by medical testing. Dkt. 12, at 3-5.

In general, a treating physician's opinion should be afforded greater weight than other physicians' opinions, because "he [or she] is employed to cure and has a greater opportunity to observe the patient as an individual." *Sprague v. Bowen*, 812 F.2d 1226, 1230 (9th Cir. 1987). The opinion of a non-treating physician, "with nothing more," is not itself substantial evidence sufficient to reject the opinion of a treating physician. *Pitzer v. Sullivan*, 908 F.2d 502, 506 n. 4; *Lester v. Chater*, 81 F.3d 821, 832 (9th Cir. 1995). *C.f., e.g., Magallanes v. Bowen*, 881 F.2d 747, 751-55 (9th Cir.1989); *Andrews v. Shalala*, 53 F.3d 1035, 1043 (9th Cir.1995); *Morgan v. Apfel*, 169 F.3d 595, 602 (9th Cir.1999).

On the surface, it could appear that the ALJ articulated specific and legitimate reasons for rejecting Dr. Aurand's opinion, *see* Tr. 29, but upon close consideration, the reasons given are insufficient. Of particular concern is the ALJ's finding that Plaintiff has the residual functional capacity to perform light work, which contradicts Dr. Aurand's opinion that Plaintiff is capable of only sedentary, not light, work. Tr. 22, 29, 492. The ALJ's finding is of critical importance, given the conclusions of the Vocational Expert, who considered one hypoethetical where a person with Plaintiff's limitations performs light work, concluding that jobs exist, and

another hypothetical in which the same person only performs sedentary work, concluding that no jobs exist. *See* Tr. 61-63.

The ALJ rejects Dr. Aurand's opinion that Plaintiff could only perform sedentary work because it conflicts with the record. Tr. 29. The ALJ provides an example: "For example, [Plaintiff's] musculoskeletal range of motion was normal in January 2013. Neck range of motion was also normal." Tr. 29, 30. However, the context for this example is a diagnostic examination in an emergency room, where Plaintiff is diagnosed with acute bronchitis. Tr. 378-81. Next, the ALJ may be correct that Dr. Aurand's reports do not thoroughly "explain the basis" for her opinion, but Dr. Aurand examined Plaintiff on two separate occasions during which she explicitly focused on Plaintiff's ability to work, *see* Tr. 492-500, so the opinion should not be summarily rejected.

The ALJ also uses Dr. Johns as an example of an opinion that conflicts with Dr. Aurand, but Dr. Johns did not evaluate Plaintiff's physical exertion limitations. Tr. 317-320. And Dr. Ramsthel, whose opinion the ALJ gives "significant weight," concludes that Plaintiff can carry 10 to 15 pounds infrequently. Tr. 29, 329. *See* 20 C.F.R. § 416.967(a). Plaintiff argues that the Court should re-weigh the evidence and consider Dr. Utley's opinion, which the ALJ did not directly rely upon to reject Dr. Aurand's opinion, but the Court should not substitute its own judgment or undertake to re-weighing conflicting evidence. *Holohan v. Massanari*, 246 F.3d 1195, 1201 (9th Cir. 2001); *Craig v. Chater*, 76 F.3d 585, 589 (4th Cir. 1996).

The case should be remanded for reconsideration of Dr. Aurand's opinion and of Plaintiff's physical exertion limits.

b. *Examining psychologist: Dr. Donna J. Johns* (Tr. 29, 317-320)

Plaintiff argues that the ALJ failed to give sufficient reasons to reject the opinion of Dr.

Johns, who performed a consultative psychological examination. Dkt. 11, at 8-10. According to Plaintiff, the ALJ erred by giving only "some weight" to Dr. Johns' opinion when substituting her judgment for that of a medical expert and disregarding other testimony supporting Dr. Johns' opinion. *Id*.

The ALJ provided specific and legitimate reasons sufficient to reject Dr. Johns' opinion. The ALJ points to internal inconsistencies of Dr. Johns' report, for example, where Dr. Johns concludes that Plaintiff cannot sustain work-related acitivities due to social anxieties but does support this conclusion with her written observations of Plaintiff's daily social interactions. Tr. 29. *See* Tr. 319, 320. The ALJ also points to inconsistencies between Dr. Johns' opinion and other opinions. Tr. 29. For example, Dr. Johns opines that Plaintiff cannot not engage in persistent concentration, which conflicts with other treating providers' observations of Plaintiff's engagement with daily activities. Tr. 273, 347, 354, 380. The rejection of Dr. Johns' opinion by the ALJ is specific, legitimate, and supported by the record. The ALJ's findings as to Dr. Johns should be affirmed.

The case should not be remanded for reconsideration of Dr. Johns' opinion.

c. *Third party evidence: Andrea Ponce, Mary Suarez, and Joyce Hewling* (Tr. 31, 32, 196-203, 245-247)

According to Plaintiff, although the ALJ addressed each one of the third party witnesses individually, the ALJ offered no germane reason to reject them, because their rejection was only based on a misreading of Plaintiff's own statements about her limitations. Dkt. 11, at 10-13. However, the record supports the ALJ's findings as to each third party witness. First, as to caretaker Andrea Ponce, the ALJ gives her written statement "some weight" because "the record does not show . . . that the care Ms. Ponce provides [to cook, clean, and shop] is necessary." Tr. 31. The record supports this conclusion. *See, e.g.*, 45, 56, 371, 372, 427-29. The ALJ gives

limited weight to Mary Suarez' written statement, because "the record indicates a higher level of functioning than reported by Ms. Suarez," a conclusion supported by the record. *Id*.

The ALJ gives "some weight" to evidence from Joyce Hewling, Plaintiff's mother, on the basis that "it is generally consistent with the record" and "shows that despite [Plaintiff's] deficits, [Plaintiff] retains the ability to perform a variety of tasks on a consistent basis." Tr. 31. *See* Tr. 197-203. Contrary to Plaintiff's assertion, this is not an express rejection of Ms. Hewling's testimony, but rather is an acknoweldgement of the limitations of Ms. Hewling's testimony, which is lay testimony, not medical expert testimony. *See* 20 C.F.R. § 404.1513(d)(3). *C.f. Turner v. Comm'r of Soc. Sec*., 613 F.3d 1217, 1224 (9th Cir. 2010)("the ALJ may expressly disregard lay testimony if the ALJ 'gives reasons germane to each witness for doing so'"), citing *Lewis v. Apfel*, 236 F.3d 503, 511 (9th 2001). Even if the ALJ's opinion is read as a rejection of Ms. Hewling's testimony, Plaintiff does not articulate any prejudice caused by not more heavily weighing Ms. Hewling's testimony, so any error was harmless. *See* Dkt. 11, at 13.

The case should not be remanded for reconsideration of third party testimony.

d. Remedy.

Applying the "credit as true" immediate award of benefits is not appropriate, because there is at least one outstanding issue to be resolved. *See infra*. *Smolen v. Chater*, 80 F.3d 1273, 1292 (9th Cir. 1996). Instead, the case should be remanded.

* * *

ORDER

Therefore, it is hereby **ORDERED** that the ALJ's final decision denying Plaintiff Rebecca Hewling Supplemental Security Income benefits is **REVERSED AND REMANDED**

for reconsideration of the opinion of Dr. Kelley Aurand and of Plaintiff's physical exertion limits.

Dated this 16th day of November, 2015.

ROBERT J. BRYAN
United States District Judge